

SYMPOSIUM ON INTERNATIONAL LAW: ITS ORIGIN, OBLIGATION, AND FUTURE.

(Read April 15, 1916.)

I.

OUTLINE.

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I. ORIGIN.—International law, like all other kinds of law, originated in the necessities of intercourse between human beings. Just as rules developed for the regulation of life within individual groups, so, as groups became permanent and were transformed into states, rules developed for the regulation of their intercourse with one another. The system thus gradually formed was not artificial in any sense other than that in which all legal systems are artificial. Regulation is just as essential to the relations between groups of men as it is to the relations between individual men.

In spite of the fact that it was formerly the fashion of writers to say that the law of nations, or international law, was altogether of modern origin, the recent researches of scholars have tended more and more to disclose the existence of well-defined rules for the regulation of international intercourse among the ancients. There existed, for example, among the Greeks and the Romans, a large body of customary law governing their intercourse with aliens and with alien states. Among the Greek states themselves, there was a large body of usages in accordance with which their relations were conducted. The judicial settlement of disputes between them, by means of arbitration, was carried to a very high point and was attended with a large measure of success. Within the past twenty years, much light has been thrown on this subject by the study of inscriptions, which has conclusively demonstrated as clear and precise an application of the judicial method to the settlement of dis-

putes between the independent Greek states, as has been made to the settlement of disputes between nations in recent times.

These things I particularize for the purpose of emphasizing the point that all law, so called, whether national or international, grows out of the necessities of human intercourse. We commit a fundamental error in thinking of any system of law as an artificial creation.

II. OBLIGATION.—It was altogether in harmony with the view above expressed that Grotius and other so-called founders of the modern system of international law regarded its acceptance as a fundamental condition of the admission of a state to its benefits. By these writers the system was regarded as having had its origin among the Christian states of Europe, and non-Christian states were admitted to its benefits only to a limited extent. In course of time, this conception ceased to be sufficiently comprehensive. By the Treaty of Paris of 1856, Turkey was expressly declared to be admitted to the benefits of the public law and concert of Europe. Subsequently, certain states of the Far East, beginning with Japan, expressly assented to the system and were duly recognized as participants in it.

But, so far as obligation is concerned, it matters not whether the system was tacitly accepted or expressly adopted. In both cases, the obligation is the same.

It is necessary, however, to observe the distinction between obligation and enforcement—between the duty to observe a certain rule and the power to compel its observance. The failure to make this distinction constantly produces confusion. We know, as a matter of fact, that, in the attempts to enforce municipal law, a failure of justice often takes place. The skill of an attorney or the bias of a juror may, and no doubt often does, result in the acquittal of a guilty defendant, and yet it does not occur to anyone to say that, because the defendant thus escaped the punishment which he should have been obliged to undergo, the duty of obedience to the law did not in his case exist. Such a suggestion we should regard as absurd. Nevertheless, we daily hear the allegation that there is no such thing as international law, because, forsooth, some nation has violated, or is said to have violated, an acknowledged rule.

There is as little reason for the assertion in the one case as in the other.

III. THE FUTURE.—Since the great conflict in Europe began, the days have perhaps been rare on which the teacher or student of international law has not been greeted with the profound remark that there is no such thing as international law, or that international law has come to an end. As there are comparatively few persons who have deeply studied international law, it should not seem to be ungracious to say that such remarks betray a want of information, or at any rate of reflection. The rules of international law are by no means so indefinite or uncertain as they are often supposed to be, or as interested persons often seek to make them appear to be; nor is their observance by any means so casual as is sometimes imagined. It would be difficult to find in international law an example of uncertainty greater than that which attended the interpretation and enforcement of the so-called Sherman Anti-Trust Law, which, after twenty years of strenuous controversy, was left to be interpreted according to the "rule of reason." Nor is international law in ordinary times badly observed. It is, in fact, usually well enforced; and any differences in regard to its interpretation and enforcement are, except in matters of a political nature, commonly left to international tribunals for determination, in connection with individual claims.

The present misconception in regard to international law is largely due to the tacit but unfounded assumption that municipal law is well enforced in time of war. Precisely the contrary is the fact. There is indeed an ancient maxim of the common law, to the effect that in the midst of arms the laws are silent—*Inter arma silent leges*. This maxim was not a creation of the fancy, but was merely an expression of the results of experience. Law never has been and never will be found in a flourishing condition between firing lines. War itself means that the reign of law has been superseded by a contention by force. During war the ordinary law is constantly superseded by martial law, which has been defined as the "will of the commander-in-chief"; and while this does not mean an unregulated will, or mere caprice, it does signify the supplanting of the system by which rights are ordinarily regulated and enforced.

The fact is not today generally appreciated that the fundamental guarantees of personal liberty were set aside in the United States during the Civil War, and that the people lived under a military dictatorship. A benevolent dictatorship it may have been and no doubt generally was, but it was nevertheless a dictatorship. When, soon after the outbreak of the war, a citizen of the state of Maryland, which had not seceded from the Union, sought to avail himself of the writ of habeas corpus, the marshal of the court who sought to serve the writ was informed by the military officer who held the prisoner in custody that he took his orders not from the courts but from the War Department at Washington. The meaning of this was that the constitutional guarantees of personal liberty were suspended; and grave statesmen went so far as to announce that they approved the course of the administration just in proportion as it disregarded the law. There were many persons at the time who thought that the constitution of the United States had come to an end, just as many persons are now saying that international law has come to an end. The difficulty with such persons is that they look for law between firing lines, and regard a temporary phase as a permanent condition.

I do not hesitate to affirm that the violations of international law during the present conflict in Europe, fierce and wide extended as it is, have not exceeded, either in number or in importance, those that occurred during the wars growing out of the French Revolution and the succeeding Napoleonic Wars. In reality, many recent violations, which are commonly supposed to be new, have precise precedents or analogies in what took place in the former titanic struggle, in which there were extensions of the contraband list and interferences with commerce under pretences of blockade, just as there have been during the present great struggle. These things are done, not because of any uncertainty as to the law, but because the parties to the war, being engaged in a life and death contention by force, naturally think more of their own safety than of the interests of neutral nations.

Nor is there in these things any reason for discouragement as to the future of international law. As the ordinary rules of intercourse have in all previous conflicts been more or less disregarded,

according to the exigency or the intensity of pressure, so it has been found that, when the incidents of the struggle came to be surveyed, there arose a general desire to extend the domain of law, to define its rules more clearly, and to take measures for their more effectual enforcement. This was what happened after the Thirty Years' War. The same thing occurred after the close of the wars growing out of the Spanish Succession. It happened again after the close of the Napoleonic Wars; and a similar phenomenon distinguished the ending of the Crimean War. Many of the mournful lucubrations regarding violations of international law in the present war have, consciously or unconsciously, a partisan character, and are intended to further the interests of the one side or the other. We should be on our guard against such lamentations. They are by no means new in character; they are characteristic of all wars. All armed contests are characterized by charges and countercharges of violations of law, and such charges are partly false and partly true. There never took place, and never will take place, a contention by force in which the so-called rules of war were not violated. War itself means the killing and maiming of human beings, and, in the passions it excites and the fears it creates, excesses will inevitably be committed. It is in the nature of things that it should be so.

Judging, therefore, by the past, we are justified in looking forward to important developments in international law after the present great conflict shall have been ended. These developments will naturally take place along the ordinary lines of legal progress. In the first place, there will always be differences to be settled. This is a matter of primary importance, since it involves the avoidance of conflict and the preservation of peaceful conditions of legal growth. We may call this the judicial aspect, which has been dealt with chiefly through international arbitration.

But, in the second place, while law must be interpreted, it must also be progressive, and must keep pace with changes in conditions. The greater part of international law has been developed through usage, but, during the past hundred years, it has undergone a marked development through acts which were in their nature legislative. To what extent is it possible to enlarge and render more efficient the legislative method in the international sphere? Up to the present time,

the chief obstacle has been the requirement of unanimity. Acts which seemed to be beneficent have been blocked because two or three powers, or perhaps one power, refused to assent to them.

In the third place, we have the administrative aspect of the system. Is it possible to develop anything in the nature of an international administration? We know that in certain matters, such as that of the posts and the telegraph, marked progress has been made in that direction. The great difficulty arises when we come to deal with things of a contentious nature. We have heard a great deal of "international police." An examination of what has been said on the subject must be admitted often to betray an exceedingly slight comprehension of fundamental conditions. So far as the phrase "international police" implies the use of force, it involves the most serious of all problems with which the student of international affairs and the statesman can be confronted. The use of force effectively is a matter that readily assumes immense proportions; the use of force ineffectively may readily create a condition of anarchy.

Lastly, we are brought to the consideration of the question as to whether and to what extent it is possible, by means of organization, to secure the more effective development, interpretation and enforcement of international law. It is not a new question, but it is a very serious and difficult one. Europe has been trying for hundreds of years to find a solution of it, but has not yet succeeded. The mere association of nations, as they now exist, in an alliance or league, with a view to bring force to bear upon a recalcitrant nation as readily as it can be applied to a recalcitrant individual in a municipality, would of itself afford little assurance either of effectiveness or of permanency. The difficulties are too complex to be solved by any single agency.

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